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No. 83-276

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL.,
APPELLANTS,

v.

MINNESOTA PUBLIC INTEREST
RESEARCH GROUP, ET AL.,
APPELLEES.

On Appeal From the United States District Court For the District of Minnesota

BRIEF OF THE TRUSTEES OF BOSTON UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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BRIEF OF THE TRUSTEES OF BOSTON UNIVERSITY AS AMICUS CURIAE IN SUPPORT OF APPPELLANTS

INTEREST OF AMICUS CURIAE

The Trustees of Boston University was chartered by statute of the Commonwealth of Massachusetts in 1869 as a body corporate not for profit.* It operates Boston University, an institution located in Boston, Massachusetts, comprising sixteen Schools and Colleges which provide a diverse educational program for undergraduate, postgraduate, and professional students. The total student population of the University is now approximately 28,000; its instructional staff in the several professorial ranks and instructorships numbers 2549. Many of the University's students receive financial aid of the kind involved in this litigation.

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* Letters from counsel for the parties, consenting to the submission of this brief, have been filed with the Clerk.

The educational mission of Boston University is not confined to transmission of the bodies of knowledge and modes of inquiry cognate to the various disciplines in which instruction is offered, but encompasses preparation of its students to become responsible members of a democratic society. As part of this effort, the University seeks to develop in each student a sensitivity to the intimate link between enjoyment of the benefits of membership in a society and participation in the burdens of keeping that society strong, vital and free. The University sees an affirmation of that link in the statute under challenge in this suit.

SUMMARY OF ARGUMENT

Section 1113 establishes a wholly legitimate eligibility criterion for federal financial aid to students, namely, that any applicant who is required by law to register with Selective Service must certify before receiving financial aid that he has completed his registration. The District Court erroneously construed the statute as permanently disqualifying any student whose registration is even a day late. This construction, on which appellees rely to bolster their arguments, has no support in the language or the legislative history of Section 1113, and contradicts the presumptively correct administrative interpretation.

Even if the District Court's interpretation were correct, Section 1113 would not constitute a bill of attainder. It merely sets forth conditions for

future receipt of federal benefits, defined in terms of standards of conduct laid down by general law. Section 1113 subjects no individual or group to "trial by legislature"; it offends neither the letter nor the spirit of the Bill of Attainder Clause.

Nor do the procedures that implement Section 1113 conflict with appellees' privilege against self-incrimination. Appellees are ineligible for benefits because they cannot demonstrate that they have complied with the Selective Service registration criterion, not because they have refused to incriminate themselves. In this civil administrative application process, concluding that appellees have not met their burden of proof or drawing an adverse inference from their assertion of a right to remain silent would not impermissibly burden the exercise of the privilege.

ARGUMENT

I. CONTRARY TO THE DISTRICT COURT'S VIEW, SECTION 1113 REQUIRES CERTIFICATION OF CURRENT DRAFT REGISTRATION STATUS ONLY, AS A GENUINE ELIGIBILITY CRITERION FOR TITLE IV AID.

Section 1113 of the Department of Defense Authorization Act of 1982, Pub. L. No. 97-252, 96 Stat. 748 (to be codified at 50 U.S.C. App. §462(f)) ("Section 1113"), represents a considered congressional decision that, as a matter of federal financial aid policy, limited aid resources should be available only to those students who are willing to meet their responsibilities to their country by registering with the Selective Service System. The statute therefore requires applicants to show that they have registered (or are not legally obliged to register) before receiving federal financial aid. The District Court below misapprehended the purposes, the meaning, and the workings of the statutory scheme.

Section 1113 governs eligibility for grants, loans, and loan guarantees under Title IV of the Higher Education Act of 1965, Pub. L. No. 89-329, 20 U.S.C. §§ 1070-1089 ("Title IV"). Title IV includes a multifaceted scheme of financial aid programs for post-secondary education.

One of the purposes of Section 1113 was to provide a more immediate incentive for students to register with Selective Service. The statute's proponents were concerned by statistics indicating that more than half a million young men had failed to register, many of them deliberately. See, e.g., 128 Cong. Rec. H4758 (daily ed. July 28, 1982) (remarks of Rep. Solomon). The Title IV eligibility requirement would serve as a spur to registration of those who otherwise might intentionally or unintentionally remain unregistered without understanding the

seriousness of their conduct. Id. at H4757.

The statute also furthers several important educational policy objectives. First, as the provision's original sponsors observed, Section 1113 deals with the subject of "rights and responsibilities," a vital issue in educational philosophy. See 128 Cong. Rec. S4943 (daily ed. May 12, 1982) (remarks of Sen. Mattingly).[1] The courts have

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[1] Section 1113 was first introduced by Senators Mattingly and Hayakawa as a floor amendment to the Department of Defense Authorization bill, S. 2248, 96th Cong. 2d Sess., 128 Cong. Rec. S4943 (daily ed. May 12, 1982). The amendment received the endorsement of Senators Tower and Stennis, the ranking majority and minority members of the committee that had reported the bill, and quickly passed. Id. at S4944-45.

After Representative Solomon had introduced a similar bill in the House, the Department of Education drafted a modification incorporating procedural

(footnote continues)

often emphasized that recognition and acceptance of the responsibilities of citizenship is an essential part of the educational process in a democracy. See, e.g., Healy v. James, 408 U.S. 169, 193 (1972); Esteban v. Central Missouri State College, 415 F.2d 1077, 1088-89 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (Blackmun, J.); see Ambach v. Norwick, 441 U.S. 68, 76-77, 80 (1979). Senator Hayakawa also pointed out the fiscal constraints on the government's ability to provide financial aid to all students. 128 Cong. Rec. S4943-44 (daily ed. May 12, 1982); see H.R. Rep. No. 208, 97th Cong., 1st Sess. 730-34 (1981)

(footnote continued)

improvements, which was offered as an amendment by Representative Hartnett. Representative Solomon welcomed the Department's input and endorsed the Hartnett amendment. 128 Cong. Rec. H4763-64, H4766 (daily ed. July 28, 1982) (remarks of Reps. Hartnett and Solomon).

(detailing fiscal 1982 cuts). To make these scarce funds equally available to students who were refusing to register would not be fair to the vast majority who had been willing to expose themselves to the risk of a draft.[2]

To accomplish all these goals, Congress designed a statute that would encourage registration both by future classes of eighteen-year-olds and by students who had already let their registration deadlines pass. Those who had lost their eligibility for financial aid by failing to register could regain

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[2] In fact, as the legislative history stresses, registration does not entail definite exposure to a future draft; issues of classification (particularly as a conscientious objector) remain open for later determination. See, e.g., 128 Cong. Rec. H4761 (daily ed. July 28, 1982) (remarks of Rep. Stratton).

that eligibility by finally registering. Representative Solomon stated:

> Back in February, on February 1, when President Reagan offered a 30-day grace period to many of these young men, hundreds of thousands of young men took advantage of that. And I just think this is going to be an additional encouragement.

128 Cong. Rec. H4758 (daily ed. July 28, 1982). Similarly, Senator Stennis observed that the nonregistered student

> still has complete control of the situation. All he will have to do is just to comply with the law, and that will automatically make him eligible so far as this prohibition or restriction is concerned.

128 Cong. Rec. S4945 (daily ed. May 12, 1982). See also 128 Cong. Rec. H4757 (remarks of Rep. Whitehurst); id. at H4764 (remarks of Rep. Hartnett); id. at H4769 (remarks of Rep. Montgomery) ("they are not eligible until they register and

he has even included that if they do register then they would be eligible").

The statute itself provides that any person to whom the Secretary of Education proposes to deny assistance or benefits shall be given an opportunity

> to provide the Secretary with information and materials establishing that he has complied with the registration requirement under Section 3 [50 U.S.C. App. § 453].

50 U.S.C. App. § 462(f)(4). Accordingly, the Secretary's regulations require only that applicants certify that they are currently registered with Selective Service or that they are not legally obliged to register. See 48 Fed. Reg. 15578, 15582, 15583 (1983) (to be codified at 34 C.F.R. §§ 668.25, 668.27). The regulations do not inquire into past periods of noncompliance. As the regulatory preamble explains,

> consistent with the statutory intent to encourage registration, under these regulations any nonregistrant who was required to register but did not may still qualify for aid in the future payment periods if he registers with Selective Service and complies with the statement and verification requirements.

Id. at 15580.

Notwithstanding the statutory language and the legislative history, the District Court rejected these regulations as void and incompatible with the statute. The District Court insisted that the statute imposed permanent disqualification from Title IV aid on any student who had not registered within 30 days of his eighteenth birthday. Appendix to Appellants' Jurisdictional Statement [hereinafter App.] at 33a-34a. The District Court's construction of the statute was erroneous for at least four separate reasons.

First, the language on which the District Court relied does not support its interpretation. That language states only that:

> Any person who is required under section 3 [50 U.S.C. App. § 453] to present himself for and submit to registration under such section and fails to do so in accordance with any proclamation issued under such section, or in accordance with any rule or regulation issued under such section, shall be ineligible for any form of assistance or benefit provided under Title IV of the Higher Education Act of 1965.

50 U.S.C. App. § 462(f)(1). The reference to proclamations, rules and regulations merely recognizes the fact that Section 3 by its own force imposes no obligation to register; it is only when proclamations, rules and regulations are promulgated that the obligation arises. See 50 U.S.C. App. § 453; Rotsker v.

Goldberg, 453 U.S. 57, 60-62 (1981); United States v. Wayte, 710 F.2d 1385, 1388 (9th Cir. 1983). The District Court, however, interpreted this language as rendering permanently ineligible every student who fails, even temporarily, to comply in full detail with any regulations issued under Section 3. Even if this were a plausible reading, it would be at most one among a number of possible constructions, and it is a construction that finds no support in either the legislative history or the views of the administering agency.[3]

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[3] Appellees' championing of this strained interpretation is understandable, since they are seeking technical reasons for judicial interference with a policy judgment they dislike. Why the District Court accepted their argument is less clear; that Court's cursory treatment of the question and its failure to address the relevant bases of interpretation leave few clues for reconstructing its reasoning.

Both the legislative history and the legislative purpose reinforce the Secretary of Education's interpretation of the statute in his regulations. As described above, the chief proponents of the bill expressly stated their intention to encourage students who had already flouted the registration requirement to present themselves for registration. Indeed, the Selective Service laws speak of registration as a duty that continues beyond the initial 30-day period, 50 U.S.C. App. § 462(d), and the Selective Service regulations themselves provide that "[t]he Director of Selective Service shall also arrange for and supervise the registration of those persons who present themselves for registration at times other than on the days fixed for any registration," 32 C.F.R. § 1615.2 (1982).

The District Court's harsh and unforgiving interpretation of the statute would thwart the explicit legislative purpose of encouraging nonregistrants to accept their responsibility. Frustration of expressed legislative intent is hardly the purpose of statutory interpretation.

Furthermore, the interpretation of the statute favored by the Secretary of Education is entitled to particular deference in this case, since he took a major role in its drafting. See note 1 supra. "Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." Miller v. Youakim, 440 U.S. 125, 144 (1979). The Secretary's interpretation was also promulgated pursuant to express statutory authority to "issue regulations to implement the requirements of this subsection." 50 U.S.C. App.

§ 462(f)(4). Interpretations adopted pursuant to such authority always command particular attention.

Finally, the District Court's rejection of the Secretary's firmly grounded interpretation is strikingly inconsistent with the rule that an act of Congress should "be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality." St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981). The District Court apparently regarded the permanent disqualification of late registrants as crucial to its holding that the statute created a bill of attainder. App. at 12a, 34a. Yet the District Court adopted precisely the interpretation that a cardinal rule of constitutional adjudication required it to reject.

Thus, the District Court clearly erred in rejecting the interpretation of Section 1113 implemented by the Secretary of Education in his regulations. The statute requires only that the student have registered with Selective Service by the time he signs the certification form in order to be eligible for Title IV aid.

II. SECTION 1113 DOES NOT POSSESS ANY OF THE CHARACTERISTICS OF A BILL OF ATTAINDER

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without the protections of a judicial trial." Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977). These three elements -- specificity, legislative "trial" of the affected class, and imposition of punishment -- must all be present before a statute will

constitute a bill of attainder. Since Section 1113 imposes an eligibility criterion for receipt of a federal benefit, framed in terms of generally applicable standards of conduct, it possesses none of these defining characteristics.

This Court has explained the Bill of Attainder Clause of Article I, § 9 "as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature." United States v. Brown, 381 U.S. 437, 442 (1965).

> By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rulemaking. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem

> to be the duty of other departments." Fletcher v. Peck, 6 Cranch 87, 136.

Id. at 446; see generally Note, The Bounds Of Legislative Specification: A Suggested Approach To The Bill Of Attainder Clause, 72 Yale L.J. 330, 343-48 (1962).

The properties that characterize bills of attainder derive from this purpose of confining the legislature to its proper sphere. The first and most basic element of a bill of attainder is its specificity. The statute invalidated by this Court in United States v. Lovett, 328 U.S. 303 (1946), singled out three government employees by name for punishment. See id. at 305 n.1. The only other statute that this Court has identified as a bill of attainder in this century singled out the Communist Party by name from among all similar organizations, and

imposed a permanent disqualification on Party members regardless of any future changes in the nature or conduct of that Party. United States v. Brown, 381 U.S. 437, 450-51 (1965).

Improper specificity may be present in a statute if "the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 86 (1961). Thus, in a pair of Nineteenth Century cases, this Court invalidated as bills of attainder disabilities imposed in 1865 on those who had performed certain arguably disloyal but not unlawful acts during the Civil War. Ex parte Garland, 71 U.S. (4 Wall.) 333, 377 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 318 (1867); see also

Pierce v. Carskadon, 87 U.S. (16 Wall.) 234 (1872) (per curiam).

In contrast, this Court has repeatedly emphasized that legislation assigning consequences to generally designated present or future activities does not constitute a bill of attainder. United States v. Brown, 381 U.S. 437, 450-52 (1965); Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 86-88 (1961). To view legislative classifications based upon present or future conduct as raising attainder questions would convert the Bill of Attainder Clause from a guarantee of the separation of powers into a vehicle for judicial second-guessing of broad legislative policy decisions. "However expansive the prohibition against bills of attainder, it surely was not intended

to serve as a variant of equal protection doctrine." Nixon v. Administrator of General Services, 433 U.S. 425, 471 (1977).

The second element, legislative "trial," is present only when Congress purports to determine that particular individuals or groups have certain undesirable attributes. "[A] legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics." United States v. Brown, 381 U.S. 437, 454 n.29 (1965).

The final defining element, imposition of "punishment," was analyzed at length by this Court in Nixon v. Administrator of General Services, 433 U.S. 425

(1977). There, the Court identified three factors useful in determining whether unfavorable treatment should be deemed punishment for bill of attainder purposes. First, the Court looked to a historical list of sanctions: imprisonment, banishment, confiscation of property, and barring attainted individuals from employment. Id. at 474-75. Second, the Court applied a functional test, asking whether the law "reasonably can be said to further nonpunitive legislative purposes." Id. at 475-76. Third, the Court looked to the legislative record for evidence of a "congressional intent to punish." Id. at 478.

As is demonstrated below, Section 1113 suffers from none of the vices that characterize a bill of attainder or that prompted the constitutional prohibition.

A. Section 1113 Lacks The "Specificity" Of A Bill Of Attainder.

The District Court below held that Section 1113 was impermissibly specific because it singled out the class of persons who have committed "the past act of nonregistration." App. at 12a, 34a. This holding was predicated on the District Court's erroneous interpretation of Section 1113 as placing an irremovable stigma on any student who had not registered within thirty days of his eighteenth birthday, a stigma rendering him permanently ineligible for Title IV aid even if he registered subsequently. If the District Court erred in its interpretations, as argued supra, this holding must also fall. Even if the interpretation were correct, however, the District Court's analysis is insupportable under

this Court's precedents on bills of attainder.

Under the District Court's interpretation of Section 1113, the statute would single out for Title IV ineligibility all persons who have failed in the past or will fail in the future to register for Selective Service within the time limits prescribed by Presidential Proclamation No. 4771. A few of these individuals may already be identifiable, and many more could be identified with sufficient effort, but the major thrust of the statute is directed towards the indeterminable mass of unknown persons who will fail to register in the future. By the time they enter the restricted class, their conduct will have become "past acts," but only in the sense in which every prospective regulatory statute is

enforced exclusively against persons who have already committed a violation. This is not the kind of past conduct that serves to describe specific individuals. If the fact that some of the affected students had already failed to register before the statute was passed could make Section 1113 a bill of attainder, then every statute with some retrospective effect would be a bill of attainder. As this Court observed in the Communist Party case, "whatever the source from which the legislative experience and instruction derived, the Act applies to a class of activity only, not to [appellees] as such. Nothing in this offends the constitutional prohibition of attainder." 367 U.S. at 88.

The District Court's error is made clearer, of course, by its reliance on a mistaken construction of the statute.

The ineligibility for Title IV funds is not triggered by past acts in any sense, because it is the student's current failure to rectify his status by registering that precludes his receipt of financial aid. As Senator Stennis observed, though the student has not yet registered, "he still has complete control of the situation." 128 Cong. Rec. S4945 (daily ed. May 12, 1982).[4]

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[4] In dismissing the Government's argument on this point, the District Court stated, "To say that plaintiffs can escape the section's prohibitions by simply registering is to say that an allegedly unconstitutional law becomes valid by its mere enforcement." App. at 12a. In enunciating this non sequitur, the court unaccountably overlooked the fact that appellees' intentional failure to register is the continuation of a criminal act, and a course of conduct in which they have no right to persist. Even students who have unintentionally failed to register are legally obliged to correct that oversight once they recognize it. The present case is thus totally distinguishable from Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), in which persons who had committed acts considered lawful in the past could avoid disqualification only by swearing a false oath.

The individuals disqualified by Section 1113 are not "described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons," Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 86 (1961) -- indeed, they are not described in terms of past conduct at all. Rather, the statute sets out "general and prospectively operative standards of qualifications and eligibility," inoffensive to the Bill of Attainder Clause. Garner v. Board of Public Works, 341 U.S. 716, 723 (1951).

This Court's observations on "escapability" in United States v. Brown, 381 U.S. 437, 457 n.32 (1965), similarly confirm that Section 1113 is not a bill of attainder. Historically some bills of attainder, passed against

named or described persons and groups, offered them the opportunity to avoid attaint by surrendering, or by remaining in exile. See Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324 (1867) (describing attaint of the Earl of Clarendon); Note, supra, 72 Yale L.J. 330, 339-40 (1962). "Escapability," therefore, does not always prevent a statute from constituting a bill of attainder, where the statute is directed against a specific person or group (e.g., the Communist Party). 381 U.S. at 457 n.32. But where every individual can extricate himself from the affected class at will because the statute is defined in terms of general standards of present conduct, no "specific" group is involved.

Thus, Section 1113 lacks even the most fundamental characteristic of a bill of attainder, the singling out of individuals or specific groups.

B. Section 1113 Does Not Embody An Explicit Or Implied Legislative Adjudication Of Guilt.

When Congress acted to limit Title IV aid to students who had complied with any duty to register with Selective Service, it did not purport to decide the guilt of individuals or to make any other adjudication. The statute sets up an administrative procedure for determining which applicants are eligible. 50 U.S.C. App. §462(f)(4). The only determinations made by Congress are (1) the tautological judgment that those who remain unregistered have not yet complied with their duty to register, and (2) the broad policy decision not to provide federal financial aid for any student until he discharges any duty to register. These are not the kind of particularistic, empirical judgments reserved for judge

and jury. Indeed, this Court has repeatedly emphasized that such policy judgments concerning categories of aid recipients are beyond the province of the courts. See, e.g., Schweiker v. Hogan, 457 U.S. 569, 593 (1982); Schweiker v. Wilson, 450 U.S. 221, 238 (1981); Harris v. McRae, 448 U.S. 297, 326 (1980); Mathews v. Diaz, 426 U.S. 67, 84 (1976); Flemming v. Nestor, 363 U.S. 603, 616 (1960).

The District Court relied upon its impression that Section 1113 legislatively determines guilt by "assum[ing] that all students who fail to submit the required statement possess a guilty intent to avoid registration requirements." App. at 12a. This impression has no basis in the statute, the regulations, or the legislative history. Aside from cases of total refusal to

cooperate with the administration of the statute, a student's failure to certify his registration indicates, at most, awareness that he has not yet registered. The statute is designed to encourage any unregistered student, regardless of the circumstances of his original failure to register, to come forward and discharge any legal duty to register with Selective Service. Senator Stennis expressly voiced his concern for the position of the unintentional non-registrant, and his satisfaction that the statute would not affect any student who was willing to rectify his status. 128 Cong. Rec. S4945 (daily ed. May 12, 1982). The fact that financial aid is withheld until the student does register reflects no assumption whatever about any person's mental state, except an assumption that he is in need of further

incentive to register. Nor does the statute adjudicate the guilt of any person or group.

C. Section 1113 Does Not Inflict Punishment.

Finally, the statute does not inflict punishment within the meaning of the Bill of Attainder Clause. This is especially obvious if the interpretation of Section 1113 implemented in the regulations is correct, but remains true even under the District Court's erroneous interpretation of the statute. Each of the three factors identified in Nixon v. Administrator of General Services, 433 U.S. 425 (1977) -- historical precedent, existence of nonpunitive legislative purposes, and tenor of the legislative record -- indicates that Section 1113 is a nonpunitive regulatory measure.

As the District Court itself recognized, "denial of federal financial aid is not a historical punishment." App. at 14a. There is no historical precedent for regarding a denial of government benefits as a bill of attainder; indeed, this Court has expressly held to the contrary. Flemming v. Nestor, 363 U.S. 603, 616-17 (1960). Thus Section 1113 lacks the first of the characteristics identified in Nixon.

Section 1113 serves numerous legitimate and nonpunitive regulatory purposes. In the sphere of educational benefit policy, the statute reinforces the fundamental linkage between privileges and responsibilities, and reserves limited aid resources for those students who have fulfilled their obligation to take a preliminary step that might ultimately contribute to the defense of

their country. This Court has long paid particular deference to legislative action conferring compensating privileges on those who accept the sacrifices that military service entails, see Regan v. Taxation With Representation of Washington, 103 S. Ct. 1997, 2003-04 (1983), especially in the field of education, see Johnson v. Robison, 415 U.S. 361 (1974); Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

The foregoing nonpunitive purposes are apparent even if one accepts the District Court's peculiar construction of Section 1113.[5] Once the correctness of

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[5] To reconcile its interpretation with a finding of punitive intent, the District Court was forced to postulate congressional vindictiveness towards students whose failure to register was wholly inadvertent, and an implicit adjudication that those students possessed "guilty intent." App. at 16a. There is not even a hint of such an extraordinary attitude in the legislative history.

the administrative interpretation is recognized, however, the statute is revealed as entirely nonpunitive: the only impact of Section 1113 on nonregistered students is to give them further incentive to bring themselves into belated compliance with the registration requirement. After the nonregistrant has rectified his status, the statute has no further effect upon him. This form of encouragement by financial incentive has little in common with the deterrent mode of the criminal law, which normally operates by threatening punishment that the criminal cannot forestall once his misdeed has been performed. Thus, under either interpretation, Section 1113 must be considered nonpunitive under the "functional test." Appellees cannot "establish that the legislature's action constituted punishment and not merely the

legitimate regulation of conduct." Nixon, 433 U.S. at 476 n.40.

Finally, the legislative history offers no support for the charge that Congress was motivated by a desire to punish nonregistrants. The District Court found three references in the floor debates to punishments and penalties, but each of these was made by the opponents of the measure. App. at 17a-18a (quoting remarks of Reps. Edgar and Goldwater and Sen. Durenberger). As this Court has long recognized, the inflated rhetoric of a bill's antagonists is not a reliable guide to the congressional intent behind its passage. See, e.g., NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 66 (1964); Nixon, 433 U.S. at 479 (rejecting congressional opponent's characterization of statute as bill of attainder).

Furthermore, this Court has never held that a statute serving legitimate regulatory purposes amounted to a bill of attainder merely because a few speakers on the floor of Congress stated that the conduct being regulated was deserving of punishment; rather, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." Flemming v. Nestor, 363 U.S. 603, 617 (1960).

The District Court also relied upon statements by the bill's proponents evidencing their belief that unthinking provision of financial aid to nonregistrants would be unfair to students who had accepted their responsibility to register, and that there was no reason why those who maintained a refusal to register should remain eligible for Title

IV benefits. App. at 18a & n.5. But these opinions as to the appropriateness of limiting a benefits policy do not demonstrate a desire to punish. To the contrary, the bill's proponents made clear that they were not trying to punish nonregistrants, but only to encourage them to register and thereby regain their Title IV eligibility.

As this Court observed in Nixon, 433 U.S. at 481-82, the details of the statute itself may demonstrate the absence of punitive intent. Congressional solicitude for the nonregistered Title IV applicants extended to careful provision of administrative procedures for challenging a denial of financial aid, 50 U.S.C. App. §462(f)(4), as well as the assurance that students could regain Title IV eligibility by regis-

tering. These very features of the statute are highlighted in the legislative history. See H.R. Rep. No. 749, 97th Cong., 2d Sess. 174 (1982); 128 Cong. Rec. S4945 (daily ed. May 12, 1982) (remarks of Sen. Jepsen); id. (remarks of Sen. Stennis).

Thus, the eligibility criterion for benefits contained in Section 1113 cannot be characterized as a "punishment." This Court has repeatedly emphasized the profound constitutional difference between government action affirmatively placing obstacles in an individual's path and government failure to remove financial obstacles not of its own creation. See, e.g., Regan v. Taxation with Representation of Washington, 103 S. Ct. 1997, 2003 (1983). The only effect of Section 1113 is to condition federal government

largesse in the form of grants, direct loans and loan guarantees. The statute leaves the student free to seek support for his education from his university, from state government, from other loan services, and from private philanthropy, as well as from family and from his own labors.

Section 1113 displays none of the characteristics necessary for recognition of a bill of attainder. It does not single out a specific individual or group; it does not adjudicate guilt through a legislative "trial"; and the withholding of Title IV aid until the applicant registers with Selective Service constitutes legitimate nonpunitive regulatory legislation.

III. THE PROCEDURES IMPOSED UNDER SECTION 1113 DO NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The District Court held that the procedure by which Section 1113 implements its eligibility requirement compels students to incriminate themselves, in violation of the Fifth Amendment. Not only was the District Court mistaken in perceiving a conflict between the statute and the Fifth Amendment, but it also erred in concluding that such a conflict would require an injunction against implementation of the certification requirement.

The District Court did not explain whether its Fifth Amendment holding was dependent upon or independent of its holding that Section 1113 was a bill of attainder. But once it is recognized that the statute establishes an otherwise valid eligibility requirement for

Title IV aid, appellees' Fifth Amendment arguments become absurd.

A. Appellees Are Not Being Compelled To Incriminate Themselves.

The procedure at issue provides that, when accepting an offer of Title IV assistance, recipients must certify either that they are not legally obliged to register with Selective Service, or that they have already done so. The form gives the recipient no opportunity to assert that he is not registered or that he registered late.[6] This is no accident

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[6] The suggested certification form is set out in the regulations, 48 Fed. Reg. 15578, 15582 (1983) (to be codified at 34 C.F.R. § 668.25). It reads:

> I certify that I will use any money I receive under the Title IV student financial aid programs only for expenses related to attendance at [insert name of school] ____; and [check as appropriate]

(footnote continues)

-- Congress was aware that asking non-registrants to identify themselves as such might raise Fifth Amendment questions, and deliberately chose not to do so. See 128 Cong. Rec. H4762 (daily ed. July 28, 1982) (remarks of Rep. Stratton).

Congress has made no attempt to elicit incriminating responses. Nonregistrants are categorically ineligible for Title IV aid; they are not required or

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(footnote continued)

___ I certify that I am not required to be registered with Selective Service because:
___ I am a female.
___ I am in the armed services on active duty (Note: Members of the Reserves and National Guard are not considered on active duty)
___ I have not reached my 18th birthday.
___ I was born before 1960.
___ I am a permanent resident of the Trust Territory of the Pacific Islands or the Northern Mariana Islands.
___ I certify that I am registered with Selective Service.

encouraged to apply, and Congress has not asked them to identify themselves on the certification form. A conscious nonregistrant who insists on applying can respond to the form only by failing to return it, by leaving it blank, by perjuring himself, or by writing in a response not available on the form. But whatever course he chooses, his conduct is entirely voluntary. A nonregistrant has nothing to gain by applying, and his actions are not "compelled."

The District Court relied on three fallacious arguments in characterizing the conduct of an applicant for Title IV aid as "compelled." First, it drew a confused analogy with Marchetti v. United States, 390 U.S. 39 (1968), in which this Court held that mandatory filing requirements directed at gamblers

were not rendered noncompulsory by the fact that the individuals could give up gambling. See App. at 25a. But the only consequence of that holding in the present situation would be a determination that mandatory reporting of nonregistered status would not be made voluntary by the fact that the individual could always register, not that voluntary submission of a preprinted form with allegedly incriminating responses is "compelled." Second, the District Court insisted that nonregistrants were compelled to answer because they were given a choice "between the rock and the whirlpool." See App. at 25a. In fact, however, nonregistrants are given no such choice at all. Since they are ineligible for aid and cannot hope to pass themselves off as eligible, they

sacrifice nothing if they refrain from applying. There is no causal relationship between the withholding of aid and the nonregistrant's decision to make a futile application. Third and finally, the District Court misconstrued this Court's line of cases dealing with "penalties" on the exercise of the privilege, App. at 26a; that error is addressed more extensively in the section immediately following.

B. Section 1113 Does Not "Penalize" Any Purported Exercise Of The Fifth Amendment Privilege.

The District Court also indicated that Section 1113 imposed an impermissible "penalty" on the exercise of the Fifth Amendment privilege. App. at 26a. But even if it were assumed that a student's refusal to complete the certification form could constitute an

exercise of the privilege, this Court's precedents demonstrate that denying the student Title IV aid would not "penalize" protected conduct.

The Fifth Amendment does not require the government to shield individuals from all adverse consequences that may flow from their reliance upon the privilege against self-incrimination. See, e.g., Jenkins v. Anderson, 447 U.S. 231, 236 (1980); Barnes v. United States, 412 U.S. 837, 846 (1973). This Court has long held that, the privilege notwithstanding, the state is free to withhold employment and other benefits from a person who refuses to supply information necessary to demonstrate his entitlement to continue receiving those benefits. Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); Gardner v. Broderick, 392 U.S. 273, 278 (1968); Kimm v. Rosenberg,

363 U.S. 405 (1960); Orloff v. Willoughby, 345 U.S. 83 (1953). "[T]estimony to secure a benefit from the Government is not ipso facto 'compelled' within the meaning of the Self-Incrimination Clause." McGautha v. California, 402 U.S. 183, 212 (1971). In Orloff, the petitioner had been conscripted under the Doctor's Draft Act and had then applied for a commission as a medical officer, but asserted the Fifth Amendment privilege in response to certain questions concerning his qualifications. This Court observed:

> No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a position of honor and trust. We have no hesitation in answering that question "No."

345 U.S. at 91.

These precedents illustrate the limited effect of the Fifth Amendment privilege on determination of entitlement to benefits. Application for government benefits is a form of civil administrative proceeding. Although the privilege against self-incrimination may be asserted in such proceedings, the tribunal is free to draw reasonable inferences, consistent with the other evidence, from its assertion. Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1976). This is even true where the individual is the respondent in an administrative proceeding initiated against his will by the government. Id. A fortiori, when the individual voluntarily initiates the proceeding in order to gain an advantage for himself, the tribunal may deny his claim if his privileged silence prevents him from presenting

sufficient evidence of his entitlement.[7] The importance of educational benefits in particular, emphasized by the District Court, does not affect this governing rule of law. Even if the benefit were so important that the applicant should be treated as if he were an involuntary participant in the proceedings, under Palmigiano the Secretary would still be permitted to draw an adverse inference from his silence.

These principles demonstrate that the Secretary of Education may deny Title IV aid to applicants who do not certify

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[7] See, e.g., Blumenthal v. F.C.C., 318 F.2d 276 (D.C. Cir.), cert. denied, 373 U.S. 951 (1963); Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 227 (D. Kan. 1979); 4 Moore's Federal Practice § 26.60[6] at 26-252; 8 C. Wright & A. Miller, Federal Practice & Procedure § 2018 at 149; cf. In re Sterling-Harris Ford, Inc., 315 F.2d 277 (7th Cir.), cert. denied, 375 U.S. 814 (1963); Sahn v. Pagano, 302 F.2d 629 (2d Cir.), cert. denied, 371 U.S. 819 (1962).

their registration, without exerting a compulsion offensive to the privilege against self-incrimination. Appellees assert a fear that they might be incriminated by their own actions because they are legally obliged to have registered but cannot truthfully certify that they have done so. If they fail to complete or submit the registration certification form, they have failed to demonstrate that they satisfy one of the necessary eligibility criteria for Title IV aid: the Selective Service registration requirement. Appellees do not suggest that they should be granted aid on the basis of other evidence of their registration, because in fact they have not registered. Given the total absence of evidence on a criterion for eligibility, the Secretary of Education would be equally justified either in denying

their applications for failure to carry the burden of proof, or in inferring that they are indeed ineligible. See Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 165-66 (1971); Konigsberg v. State Bar of California, 366 U.S. 36, 46 (1961); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923). In either case he may properly deny them Title IV assistance. Placing the burden of proof of eligibility upon the aid applicants, "as is the case when applying for most governmental benefits," creates no constitutional problem. Lavine v. Milne, 424 U.S. 577, 582, 585 (1976).

C. Acceptance of Appelles' Fifth Amendment Claim Would Not Justify The District Court's Injunction.

Even if the District Court had not erred in concluding that the Secretary's

procedures for implementing Section 1113 violated respondents' Fifth Amendment privileges, the District Court's decision to enjoin all enforcement of Section 1113 would still be unjustified. This Court's precedents teach that testimony improperly compelled by administrators in violation of the privilege against self-incrimination acquires a de facto immunity, and cannot be used against the individual in subsequent criminal proceedings. Garrity v. New Jersey, 385 U.S. 493 (1967). So long as the government does not attempt to coerce the individual to waive this immunity, it can lawfully impose sanctions for his refusal to provide relevant information. Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); Gardner v. Broderick, 392 U.S. 273, 278 (1968). No attempt has been made in the implementation of

Section 1113 to require applicants to waive any possible immunity from use of their responses. Enjoining the implementation of the statute is therefore too broad a remedy for any hypothesized self-incrimination problem. Appellees cannot be entitled both to receive financial aid and to remain silent about their registration status. Rather, the maximum possible relief would be de facto use immunity.

To the extent that this Court had a remedial choice between granting use immunity while denying financial aid, and awarding financial aid while requiring applicants to make unimmunized responses to the certification form, the legislative history of Section 1113 would demonstrate that the former option would be the one most consistent with the legislative purpose. Congress was

primarily interested in providing financial incentives for registration, not in using the Title IV application process for investigative purposes. See Leary v. United States, 395 U.S. 6, 26-27 (1969).

Thus, neither the Bill of Attainder Clause nor the Fifth Amendment provides any basis for enjoining the implementation of Section 1113. Until appellees accept their responsibility and register with Selective Service, they are ineligible for Title IV aid. The Secretary of Education does not interfere with any of their constitutional rights by denying them that aid until they demonstrate that they have registered.

CONCLUSION

Appellees' distaste for the policy choice made by Congress in passing Section 1113 is evident. They insist that their "right" to receive federal aid to advance their education overshadows

all of the public interests that prompted Congress to adopt the statute. But the Bill of Attainder and Self-Incrimination Clauses do not authorize judicial revision of such broad legislative policy choices. Section 1113 does not implicate the more specific concerns addressed by those important provisions.

For the reasons stated above, the judgment of the District Court should be reversed.

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